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LAW REFORM COMMITTEE

Inquiry into powers of entry, search, seizure and questioning by authorised officers

Melbourne – 12 December 2001

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Necessary corrections to be notified to executive officer of committee

The CHAIRMAN — On behalf of the Victorian parliamentary Law Reform Committee I welcome you to our hearing on the powers of entry, search, seizure and related matters. The evidence will be reported by Hansard. You will receive a transcript of the dialogue; please amend as appropriate and return it to the executive staff of the committee. I invite you to speak to your paper, after which my colleagues will ask a number of questions.

Mr HILAND — I thank you very much for inviting us here this afternoon. My name is Peter Hiland and I am the Executive Director, Compliance and Policy, at the State Revenue Office (SRO). My responsibilities in that Division involve the investigations branch, of approximately 50 staff; the recovery and review branches, of 30 staff; and the policy branch, of approximately 14 staff.

By way of background, the State Revenue Office collects annually about $6 billion in revenue, principally from stamp duty, payroll tax and land tax, and it distributes annually about $320 million in grants and subsidies. The commissioner has the general administration of 11 acts of Parliament and associated regulations, and as at 31 October 2001 the SRO had 429 staff.

The powers of search, entry, seizure and questioning are contained almost exclusively within Division 2 of Part 9 of the Taxation Administration Act 1997. Those powers are, by any definition, intrusive. The aim of my submission is to put into context these powers which, in our submission, are appropriate and necessary for the proper and efficient functioning of the office of state revenue. In any consideration of the nature and effect of those powers it is important that I alert you to the environment in which the office operates.

The key elements of that environment are that the taxes administered by the commission are essentially self-assessed. This is the case for payroll tax and for stamp duty, but not so for the lesser tax — lesser in dollar terms — land tax. But in the major two lines of stamp duty and payroll tax, they are self-assessed. For example, payroll tax is levied on wages and salaries that exceed a figure of $515 000 annually, not only the level of liability but the fact liability is assessed by the taxpayers themselves. In other words, once the taxpayer gets beyond that threshold point, it is their obligation to register for payroll tax and pay it. There are approximately 17 500 active payroll taxpayers in the state of Victoria, returning something in the order of $3 billion worth of payroll tax annually.

There are approximately 600 000 documents endorsed for stamp duty purposes annually, returning approximately $2.2 billion worth of stamp duty, and there are 140 000 land tax clients, who pay approximately $550 million in land tax annually.

Mr STENSHOLT — There are 46 000 fewer now.

Mr HILAND — In this environment of self-assessment, the critical ingredient required for proper administration is information, and the means of getting this information is generally by request. We have in Victoria a very compliant taxpayer base — I think that would be a fair assessment. I would have to say that the use of the coercive powers contained in the Taxation Administration Act is the exception rather than the rule. Most of the information that we require for the purposes of auditing taxpayer assessments is provided voluntarily and routinely. However, there are instances where — and I speak mainly of the stamp duty and payroll tax areas — it is necessary to compel taxpayers to provide us with information against which to check the accuracy of the assessments they have made themselves of their tax liability.

The first of the powers that in all likelihood would be used are those contained in section 73 of the Taxation Administration Act. Those are the powers to compel the production of information, documents and attendant things, followed by the power to compel people to give evidence about those matters and to give that evidence either on oath or on affirmation. It would be highly unusual for the first contact with a taxpayer to be a formal notice. Our procedures in investigations assume that we will commence any inquiry with the taxpayer with what we call an entry letter, which is simply a letter to a taxpayer advising the taxpayer that we are concerned about their affairs. We will give some indication of the nature of our concern — not full particulars, obviously — and we will give them advance notice of our proposed contact, and that might take the form of a visit by some investigators or a polite request for the provision of certain information.

In the event that we do not get compliance with that, which I stress is the exception rather than the rule, we would then use one of the compulsory notices. We would ask for the information that we require, and we are limited in the sort of information that we may ask for pursuant to notice by section 72, which restricts the exercise of the powers available under section 73 for the purposes of the taxation law. Taxation law is a defined term within the Act and

limits the sorts of purposes in respect of which we may use our coercive powers to several of the acts administered by the commissioner.

We have had a great deal of success with notices. It is not often that we are forced to take proceedings to compel compliance with a notice. You will note in section 73(8) that the only sanction provided, until recently, for failure to comply with this notice was a summary prosecution in the Magistrates Court, at which a pecuniary penalty, dependant upon the nature of the person proceeded against, was a fine of $10 000 in the case of a person or $50 000 for a corporation.

Recently the provisions of the Taxation Administration Act, or TAA, were amended to take the emphasis away from a prosecution seeking to impose a sanction for non-compliance to an alternative — and that alternative involves an application to the Supreme Court to have the Supreme Court inquire into the nature and effect of the notice and its efficacy, and to seek the Supreme Court's intervention in compelling the taxpayer to comply. So we have shifted the emphasis away from punishment for failure to comply to bringing in the aid of the Supreme Court. That has two effects — one, it increases the significance of the investigative tool — the notice — but it also brings upon the office and those using these tools the scrutiny of the Supreme Court. We believe there is a good balance in that.

The next area of coercive powers involves the right of entry and search and seizure. There are two basic forms of that. The first one is the traditional search with a warrant. It is consistent with the general run-of-the-mill search warrant provisions available in any number of taxing acts throughout the states and territories, and it is consistent with other types of search warrant regimes available, for example, under the Australian Securities and Investments Commission Act. It is the traditional one, where an application is made on oath or affirmation and is filed with the court, and if the court — that is, the Magistrates Court — is so minded, it issues a warrant, subject to any terms and conditions. It has been our pleasant experience that we have not often needed to use search warrants. In fact, in the two and a half years that I have been in my present position I think we have used it on less than five occasions.

The other provision available to us is a search without a warrant. That is available under section 76 of the Taxation Administration Act. That is available to an authorised officer — which, again, is a defined term under the TAA — in circumstances where that person believes on reasonable grounds that there are documents or things at premises that are relevant to the administration or execution of the taxation law. This power may not be exercised in respect of residential premises, except with the written consent of the occupier. But as the majority of our customers, or taxpayers, are businesses, it is available to us in respect of the majority of our taxpayers. In the two and a half years in which I have been responsible for the area of compliance, we have not had occasion to use that power.

It is, however, a very valuable power, and will become increasingly so as we move further and further into electronic commerce. It is, if you like, the only modern concession in what are a traditional set of search and seizure powers which are, if you like, variations of the sections 263 and 264 of the Income Tax Assessment Act enacted in about 1953. The search without warrant has in that section and in subsequent sections provision for access to electronic equipment for the purposes of downloading, as it were, data stored in computers, et cetera, and for operating that equipment so as to obtain information about the administration of a taxation law. The SRO believes while it has not yet been necessary to utilise that power to any great extent, it will become more important as we move further into electronic commerce, and, in particular, as we are noticing the speed with which money can be moved into, around and out of the jurisdiction by electronic transfers initiated from PCs in business offices.

There is in the sections following section 80 a series of provisions that deal with the use that may be made of information obtained pursuant to a search without warrant, compensation for any damage occasioned by the exercise of that power, and copies of documents to be given and the return schedules to be followed.

By way of general comment — I have gone into more detail about this in our written submission — I make the following remarks. The powers available to the State Revenue Office under the Taxation Administration Act are consistent with those of other revenue offices around Australia. Two states have recently enacted or are in the process of enacting taxation administration acts. Queensland has just enacted a new Taxation Administration Act and Western Australia has introduced such a bill into its Parliament. Both those pieces of legislation have provisions consistent with the powers of entry, search and seizure and compulsory questioning contained within the Victorian act. In fact, the Western Australian bill goes considerably further in relation to its powers of search without a warrant.

The provisions in the Taxation Administration Act in Victoria are subject to a considerable number of limitations, and I can take you briefly to those. Those powers may only be exercised by the commissioner or by an authorised

officer — that is a defined term. They may only validly be exercised for the purposes of a taxation act — that is a very narrow range of taxing legislation. The use of the powers is reviewable by the courts. In fact, if there is non-compliance with the powers, the only capacity to enforce them is through the courts. Section 76, which is the power to effect a search without a warrant, may only be used where an authorised person believes on reasonable grounds that there are documents or things on the premises that are relevant to the administration or execution of a taxation law. The use that can be made of the information obtained as a consequence of these powers is strictly regulated by the secrecy provisions in the Taxation Administration Act, which restrict the publication of any information obtained. There is a strict regime or schedule of persons to whom that information may be communicated, and I believe it will be affected by the privacy legislation in Victoria.

The use of the powers of entry, search and seizure conferred upon the commissioner is also tightly managed through procedures and practices that are documented and audited by a number of independent audit sources, the first of which is the Auditor-General. We are subject to comment by the Ombudsman. We are an ISO-certified body in our entirety. The commissioner is certified under ISO 9001 and is subject to six-monthly audits by our ISO auditors, and they are particularly interested in the procedures and practices we employ in relation to the use of our coercive powers. We have outsourced internal auditors who are regularly inquiring into the use of these powers and how effective they are.

I want to say a little bit about the compliance strategy employed by the State Revenue Office and how these powers fit into that strategy. As I indicated at the commencement of my submission, the State Revenue Office exists in an environment of self-assessment. The other major factor is that there is extensive use of external agents. In that environment we have composed a strategy in three parts. The first stage of that strategy is self-regulation. It is characterised by education, customer-focused service delivery and what we call light-handed regulation. I can give you an example of what we call light-handed regulation: we run a data-matching program in relation to our payroll taxpayers aimed at those taxpayers that are approaching the taxable threshold. We have the capacity to alert taxpayers as they approach that threshold and warn them that they may be approaching the point at which they need to register and to make routine returns in respect of their payroll tax. Rather than wait until they get over the barrier, so to speak, and then catch them, we have the capacity to warn them before they get there.

The second stage is what we call enforced self-regulation. It is characterised by audits commenced after notice, which is the entry letter I spoke about. Irregularities detected in terms of taxpayer compliance are rectified and will generally only attract very mild penalties.

The third and final stage is what we call enforced regulation. It is characterised by detailed investigation activity supported by heavy penalties, prosecution and recovery action for non-compliance. The number of taxpayers subjected to this stage is very small, and it is at that stage that the compulsory powers are employed. In the submission we have given you an example of the recent use of the powers in a live matter.

The final matter I need to raise before I conclude is to take up the point that the powers conferred upon the commissioner and the staff of the State Revenue Office were conferred under the Taxation Administration Act enacted in 1997. It is a consolidation of aspects of a number of pieces of legislation into one convenient location aimed at making the powers consistent and assisting in the reduction of costs associated with compliance. When that legislation went through it was considered by the Scrutiny of Acts and Regulations Committee, which raised no concerns about those powers. As I indicated previously, the powers are best described as consistent with other jurisdictions and perhaps based on a model which is ageing rapidly in an environment where we are faced with electronic commerce.

In conclusion, I would indicate that there is no doubt that the search and seizure powers conferred upon the commissioner are intrusive, but they are balanced against what can be done, as it were, with the product of the result of the use of these powers. The sanctions imposed under the Taxation Administration Act and the other acts administered by the commissioner are routinely pecuniary in nature and at the summary end of the jurisdiction. It is not as if the product of the use of these powers may be used to bring about the incarceration of persons involved in tax avoidance. In fact, the most punitive sanction that may be imposed is under section 61 of the Taxation Administration Act, which deals with tax evasion. To my knowledge that section has never been invoked. It carries a penalty upon conviction of 200 penalty units of $100 each or two years imprisonment or both, but as I indicated to my knowledge that section has never been invoked. That concludes my comments.

Mr KATSAMBANIS — Thank you for your very comprehensive overview of the Taxation Administration Act and the operations of the State Revenue Office. There are two issues I want to explore. The first is in relation to search without warrant and the electronic age. My question is essentially: is the use of the access to

electronic equipment power that you have in the act conditional on your having gained physical entry into the premises where the electronic records are stored?

Mr HILAND — Yes, generally it would be. In the main we are dealing with single-site businesses. It is not as if we can tap into a network at any point, if you like, through a bank or some other area.

Mr KATSAMBANIS — Sure. I am not talking about you tapping in through a third party, I am more directly talking about you tapping into the electronic equipment from a remote location, from your offices, as opposed to firstly effecting physical entry at a place of business. I imagine that whatever happens behind that business happens behind that business, so if their server is located somewhere else that is not an issue for you. Can you sit in your office at the State Revenue Office and electronically tap in under section 76?

Mr HILAND — No, I do not think we could do that. I think we would have real problems doing that. I believe we would come into conflict with the federal Telecommunications Act. We may need to consider our position regarding the use of that equipment. There may be some privacy issues associated with that. It is my limited experience in the federal arena that we may in fact need a warrant under the Telecommunications Act were we to employ telecommunications devices for collecting information about a third party.

Mr KATSAMBANIS — Or at least something under the Surveillance Devices Act?

Mr HILAND — Yes, under the Victorian legislation.

Mr KATSAMBANIS — The other issue I wanted to explore was section 87 of the Taxation Administration Act relating to self-incrimination. Firstly, in subsection (2) it talks about proceedings for an offence against the taxation law. Is 'taxation law' as defined by that act comprehensive enough to cover taxation laws administered by the federal government?

Mr HILAND — No. The definition of a taxation law is found in section 4 of the Taxation Administration Act. If I can take you to it, they are defined as the Debits Tax Act, the Duties Act 2000, the Financial Institutions Duty Act — to the extent that that survives — the Pay-roll Tax Act 1971 and the Taxation (Reciprocal Powers) Act 1987. That is the extent of the taxation acts. As I indicated, the vast majority of the coercive powers available to the commissioner are provided for under the Taxation Administration Act, but there are some other provisions in other acts administered by the commissioner. The First Home Owners Grant Act and the Livestock Disease Control Act are two examples where other coercive powers exist outside the operation of the Taxation Administration Act. Otherwise, the powers in the Taxation Administration Act are restricted to the acts I read out.

Mr KATSAMBANIS — Following on from that, that section against self-incrimination is worded very differently to provisions generally relating to the privilege against self-incrimination in other Victorian acts. The protection provided in other acts is to protect someone from being prosecuted for an offence for information-gathering purposes, whereas in this case, although couched as a privilege against self-incrimination, in actual fact there is no protection at all from prosecution for the primary purpose of the act?

Mr HILAND — Exactly. That is somewhat atypical. I use from my own experience the provisions contained in the Australian Securities and Investments Commission Act, which is as close to this as I know in terms of the model. This one provides that you cannot claim privilege against self-incrimination in relation to a taxation offence.

Mr KATSAMBANIS — That is consistent with revenue law but not consistent with the rest of the privilege against self-incrimination.

Mr HILAND — This is the balance I spoke of before. If you go through the Taxation Administration Act, the sanctions that may be imposed, leaving aside section 61, are in the main pecuniary and at the summary rather than the indictable end of the scale. I think that is the trade-off. The powers are definitely intrusive, but the purpose to which they can be used in terms of an ultimate sanction upon the taxpayer for non-compliance or tax avoidance is limited.

Mr KATSAMBANIS — I think you also highlighted that these enforcement powers are right at the end of scale.

Mr HILAND — They are in terms of the compliance strategy. There is a great deal of self-interest involved in that, because the effort required to sustain a campaign based on the use of coercive powers is extremely labour intensive. It exposes us to a criticism if we are too aggressive. It is out of step with our stated policy of

engaging taxpayers in voluntary compliance. Quite frankly, it is the most difficult area of our compliance activities. It usually brings forth legal representation and we find ourselves locked in battle with legal advisers and accounting advisers over the question of whether we have a right to the information rather than getting the information and getting on with our task. Therefore, we are diverted from our basic task. Where we can avoid the use of our coercive powers, we will go out of our way to do so. However, as I indicated in the submission, our entire compliance strategy is predicated on the statement that we will do all that is necessary, including the use of these powers, to effect our purpose of the proper administration of the legislation.

Mr STENSHOLT — Thank you for your submission, it was pretty comprehensive and there is some very useful stuff in it. We have become used to that from the State Revenue Office. On page 6, with your little table it refers to the relevant section of the act, which act is that?

Mr HILAND — It is the Stamps Act. Unfortunately we are talking about history. A lot of the provisions in the Taxation Administration Act as they affect stamp duty will not have effect until we have washed through the stamps matters up to 1 July 2001. Prior to 1 July 2001 the Stamps Act stood outside the Taxation Administration Act. There are current matters we are dealing with. These are the Stamps Act powers which are now in the Taxation Administration Act.

Mr STENSHOLT — That solves a little mystery we have been puzzling over.

Mr KATSAMBANIS — But they are in the Taxation Administration Act prospectively?

Mr HILAND — Yes, they are. Since 1 July the powers that were in the Stamps Act were removed, by the Duties Act, and now reside in the Taxation Administration Act. The only act of any significance in terms of our activities outside the Taxation Administration Act is now the Land Tax Act.

Mr STENSHOLT — You have 76 searches without a warrant and 77 searches with a warrant. This is probably more a comment from me than a question. Quite a number of examples of legislation have come before us where we have these parallel provisions. Do you see any real difference in terms of prosecuting? Does it make it easier in court if you have procured something with a warrant, in your limited experience?

Mr HILAND — I have had experience of similar powers in other jurisdictions, but not in Victoria. I do not think the rules of evidence applicable to the particular jurisdiction are affected one way or another.

Mr STENSHOLT — Then why have both?

Mr HILAND — It does not affect the evidentiary value of what you collect; it is the capacity to obtain it.

Mr STENSHOLT — You mean that people will let you in if you have a warrant but will not if you do not have one?

Mr HILAND — There is no guarantee that you will be let in if you do or do not have our warrant. You may have the lawful capacity but effective entry is another matter altogether.

Mr STENSHOLT — You have not described the difference between them.

Mr HILAND — There is a time delay associated with obtaining a warrant.

Mr STENSHOLT — Why bother to obtain a warrant in the first place, and why have such a provision in acts?

Mr HILAND — In recognition that the intrusive nature of a search without warrant would be greater and put our staff at higher risk of getting it wrong. Where we have time and where we believe there is not an appreciable risk — —

Mr STENSHOLT — You get a independent party?

Mr HILAND — Yes, subject to scrutiny. We always feel more comfortable if we have made our case to a judicial officer that we have reasonable grounds to intrude upon someone's business premises for the purposes of obtaining information which we may use to their detriment. Where we have time without appreciable risk of loss of that information or, as it were, alerting the person whose premises we are about to enter, then we will use the search warrant. Where we believe even the slightest indication of what we are doing may prejudice our ability to obtain,

we would seriously consider the use of section 76, search without warrant.

Mr KATSAMBANIS — The proof is in the operation because you said that in your two and a half years you have not used section 76?

Mr HILAND — I think the reasonable way to do that is because of the stance we have taken. We are trying to engage the taxpayers, and our approach has been more one of education and light-handed regulation. There will be occasions in the future where we will not be able to sustain that.

Mr STENSHOLT — Section 81 describes the seizure of electronic equipment where you can 'require' — it could be described by the people as 'force' — occupiers or employees of the premises you enter to actually operate the equipment to provide the evidence for you. Is that unique in such provisions because you have a special circumstance where much of the data is kept electronically, but it is not in other acts?

Mr HILAND — You will find the same effect by the use of the words 'render reasonable assistance', and the judicial interpretation of those words.

Mr STENSHOLT — You have added it to make it more explicit, although it can probably be read into what is already provided for?

Mr HILAND — Yes.

Mr STENSHOLT — Section 88 is an interesting one rather than people having to show identification on the way in. If they do not show identification it will be then thrown out of court. That is a different way of putting it from the norm. Is there any particular reason, or is it lost in the shrouds of time?

Mr HILAND — I am not sure. I cannot answer that one.

Mr STENSHOLT — Similarly with section 89 which, from our limited experience, is a unique provision with impersonation. For example, impersonating a Connex official, or while impersonating a fisheries officer arresting someone grabbing a bag of abalone, is not in those particular acts that I can remember, but you have one regarding impersonating a commissioner.

Mr HILAND — These are somewhat antiquated provisions.

Mr STENSHOLT — You comment in the last two pages of the submission that the investigation provisions are designed for different times. You have not taken the further step of suggesting changes to the search, entry, questioning and seizure provisions. You said you want them maintained, although you feel the current provisions are somewhat antiquated?

Mr HILAND — In themselves they do what they set out to do, but they are not the complete picture. There are examples where complementary provisions to this can be made.

Mr STENSHOLT — Do you wish to provide the committee with examples of investigatory powers, because investigation is part of the aspect of questioning?

Mr HILAND — Other models are around with which I am familiar. I am not sure how you would like me to address that.

Mr STENSHOLT — We are happy to look at suggestions for change so far as they fit within our terms of reference.

Ms HADDEN — Do you have a complaints process?

Mr HILAND — Yes. We are required to record and deal with all complaints against officers from an internal operating perspective in terms of our ISO certification. We have a compliment and complaints register where a balance of not only complaints but compliments of the activities of our staff are recorded. The suggestion of impropriety by a member of staff is immediately investigated by a senior officer, if not at an executive level or close to the executive level. We do not receive many complaints and, fortunately, I can say that in the two and a half years that I have been responsible for the division none has been substantiated, but there will be general complaints, particularly where officers are involved in the use of coercive powers in situations where a great deal of money is involved. There is no love lost in some of the exchanges, but that is part of the normal cut and thrust of

investigation activity.

Mr BOWDEN — Is there any specific legislation that the committee could consider recommending that would enhance your toolkit, to put it that way, in making it more efficient or productive in terms of legislation for the government to consider?

Mr HILAND — Yes, there is a model, and it is best, in my limited experience, expressed in sections 1323 and 1324 of the Corporations (Victoria) Act. It is a model that introduces the use of positive mandatory injunctions, again invoking the authority of the superior courts, but it allows for the freezing of assets which, in my personal view, is that the model provided for in the Taxation Administration Act has insufficient powers within it to freeze assets that are subject to a claim by the commissioner. I believe the model as set out in those two sections of the corporations act provides, if you like, the best self-contained model of where I believe the Taxation Administration Act is deficient.

The CHAIRMAN — Are you able to provide by way of follow-up any examples that you would like to base that additional power upon?

Mr HILAND — I am somewhat limited in providing specific information.

The CHAIRMAN — In abstract terms?

Mr HILAND — Yes, there are some current matters.

The CHAIRMAN — Perhaps rather than taking up the time now, you can provide them to the staff, subject to confidentiality issues, and they can be presented in non-identifying manner which would be useful for our work.

Mr HILAND — It is principally associated with the tracing and freezing of assets that are subject to claim by the commissioner.

Witness withdrew.